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# Supreme Court of the United States

OCTOBER TERM, 1966

No. 1195

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, each limited partnerships under New York Partnership Law, Article 8, and NEW YORK STOCK EXCHANGE, an unincorporated association,

*Petitioners,*

*—against—*

MORTON EISEN,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 23, 1967

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# Supreme Court of the United States

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No. .

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, each limited partnerships under New York Partnership Law, Article 8, and NEW YORK STOCK EXCHANGE, an unincorporated association,

*Petitioners,*

*—against—*

MORTON EISEN,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners seek a writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit which, by denial of petitioners' motion to dismiss, assumes jurisdiction of an appeal from an interlocutory order of the United States District Court for the Southern District of New York determining that this action is not maintainable as a class action but permitting plaintiff to litigate his individual claims.

## OPINIONS BELOW

The opinion and order of the District Court (Tyler, U. S. D. J.) is reported at 41 F. R. D. 147 and printed as Appendix A, pp. A1-A11, *infra*. Plaintiff's application for a certificate for interlocutory appeal under 28 U. S. C. A. § 1292(b) was denied in an unreported endorsement opinion, printed as Appendix B, p. A12, *infra*.

Plaintiff then filed a notice of appeal, and the opinion of the Court of Appeals denying petitioners' motion to dismiss the appeal is reported at 370 F. 2d 119, and printed as Appendix C, pp. A13-A16, *infra*. The orders of the Court of Appeals denying petitioners' petition for rehearing, and alternatively for rehearing in banc, are printed as Appendix D. pp. A17-A18, *infra*.

## JURISDICTION

The order of the Court of Appeals denying petitioners' motion to dismiss the appeal was filed on December 19, 1966. Orders of the Court of Appeals denying petitioners' motion for rehearing were filed on January 13, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED

1. Is a District Court's order which determines that a suit is not maintainable as a class action, but which expressly permits plaintiff to litigate his individual claims, a "final" decision which can be immediately appealed?

2. Is such an order appealable where under Rules 23 (c)(1) and (d) and 54 (b) of the Federal Rules of Civil Procedure the order is subject to alteration or amendment by the District Court at any time, and where the conditions of Rule 54(b) respecting entry of judgment as to fewer than all of the parties are not met?

3. Does such an order become final and appealable where the Court of Appeals assumes that the alternative to immediate appeal is the end of the action because the individual claim is too small to attract competent counsel?

4. Is such an assumption erroneous in view of the District Court's power to award counsel fees in an action of this nature?

## STATUTES AND RULES INVOLVED

The statutes involved are:

(1) 28 U.S.C. § 1291 which provides:

"§ 1291. Final decisions of district courts

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

(2) Clayton Act § 4 (15 U. S. C. § 15) which provides:

"§ 15. Suits by persons injured; amount of recovery

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws ma sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall re-

cover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The Federal Rules of Civil Procedure involved are:

(1) Rule 23, as amended effective July 1, 1966, which provides, in relevant part, as follows:

"Rule 23. CLASS ACTIONS

* * * *

"(c) (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

* * * *

"(d) Orders In Conduct Of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time."

(2) Rule 54, which provides, in relevant part, as follows:

"Rule 54. JUDGMENTS; COSTS

* * * *

"(b) *Judgment Upon Multiple Claims or Involving Multiple Parties.*

"When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

## STATEMENT OF THE CASE

Jurisdiction in the District Court was rested on Sherman Act Sections 1 and 2 (15 U. S. C. §§ 1, 2), Clayton Act Section 4 (15 U. S. C. § 15) and Securities Exchange Act Section 27 (15 U. S. C. § 78 aa).

The action was commenced on May 2, 1966. The complaint in substance charged the two major "odd-lot"* dealers on the New York Stock Exchange (petitioners Carlisle & Jacquelin and DeCoppet & Doremus) with violating the Sherman Act by conspiring with each other and with the principal stock exchanges to monopolize odd-lot trading and

*Generally, "odd-lot" transactions are those involving less than 100 shares.

to charge an excessive "differential"* upon odd-lot transactions. A separate claim against the New York Stock Exchange charged it with breaching its duty of regulation under the Securities Exchange Act of 1934 by failing to prevent the odd-lot dealers from imposing the differential. Plaintiff alleged that the action was brought both on behalf of himself and "representatively on behalf of all purchasers and sellers of odd-lots on said defendant New York Stock Exchange."

Under the mandate of new Federal Rule of Civil Procedure 23(c)(1) that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained," petitioners moved on July 1, 1966, for a determination that this action is not maintainable as a class action.

The opinion and order of Tyler, J. filed September 30, 1966 (41 F. R. D. 147; Appendix A, pp. A1-A11, *infra*) determined that the action is not maintainable as a class action but stated:

> "This does not mean, however, that the complaint viewed solely as a statement of the individual claims of the plaintiff Eisen is dismissed; moreover, nothing herein stated should be construed as a ruling on the merits, or lack thereof, of the claims pleaded on behalf of plaintiff individually."

Plaintiff moved for a certificate by the District Court for interlocutory appeal under 28 U. S. C. § 1292(b). The Court denied the application (Appendix B, p. A-12, *infra*):

*The odd-lot buyer pays a fraction of a point more per share and the odd-lot seller receives a fraction of a point less per share than the controlling round-lot price. This fraction is called the "odd-lot differential."

> "An intermediate appeal from the opinion and order filed on September 30, 1966 will not materially advance the ultimate resolution of this litigation. No controlling question of law is involved. Nothing has been done to prevent plaintiff from litigating his claims."

Plaintiff then filed a notice of appeal from the Court's original order of September 30, 1966. Petitioners moved to dismiss the appeal on the ground that the order was not final.

The motion to dismiss was denied (Waterman, Moore and Kaufman, C.JJ.) in a decision filed December 19, 1966, holding the order final because (Appendix C, pp. A13-A16, *infra*)

> "The alternatives are to appeal now or to end the lawsuit for all practical purposes. Judge Tyler's order 'if unreviewed, will put an end to the action.' . . . We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen."*

Petition for rehearing, and alternatively for rehearing in banc, was denied on January 13, 1967 (Appendix D, pp. A17-A18, *infra*).

## REASONS FOR GRANTING THE WRIT

The reasons why this Court should now review and reverse the decision of the Court of Appeals may be summarized as follows: the decision below misapplies this Court's decision in *Cohen* v. *Beneficial Industrial Loan Corp., infra,* in disregard of this Court's repeated insistence upon finality as a requirement of appealability; it conflicts

*Although without support in the record, plaintiff's special counsel stated upon the argument that the individual damages approximated $70.

with rulings in three other Circuits and prior Second Circuit decisions on the same question; it ignores the availability of attorneys' fees; it repeals an integral part of new Rule 23 of the Federal Rules of Civil Procedure and introduces needless contradiction between that Rule and existing Rule 54; and it presages countless interlocutory appeals.

**A. The decision of the Court of Appeals incorrectly applies *Cohen v. Beneficial Industrial Loan Corp.* and other decisions of this Court, disregards the availability of counsel fees, and ignores the applicable Rules of Civil Procedure.**

The decision below incorrectly applies and extends far beyond its meaning the "collateral order doctrine" of finality as applied by this Court in such cases as *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949) and *Gillespie* v. *United States Steel Corp.*, 379 U. S. 148, 152 (1964). Under the "collateral order doctrine," an interlocutory order may be regarded as final for purposes of 28 U. S. C. § 1291 only if it finally determines

> ". . . claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." (*Cohen, supra,* p. 546)

In this case the District Court's order had no such effect.

**(1) The decision below relies upon improper criteria to determine finality.**

The Court of Appeals decision rests upon an assumption that plaintiff could not obtain competent counsel in view of the small potential recovery on his individual claim, and that therefore the only alternative to immediate appeal

was termination of the lawsuit. This was the only consideration applied in sweeping aside the established criteria for finality.

No other case has been found in which the dollar amount of a claim, inevitably an uncertain, subjective and unpredictable consideration, has been deemed decisive in determining the appealability of an order. Certainly there is no suggestion in *Cohen* or other decisions of this Court that the collateral order doctrine should be so extended. Stretching the doctrine to this length destroys the Congressional requirement of finality set forth in 28 U. S. C. § 1291.

**(2) The Court of Appeals ignored the availability of attorneys' fees.**

In assuming that plaintiff could not obtain competent counsel to prosecute his individual claim in view of its assertedly small size, the court below disregarded the antitrust statute under which plaintiff sues, and the equity power of the District Court to award attorneys' fees in a case such as this.

Section 4 of the Clayton Act (15 U. S. C. § 15) expressly permits the recovery of a "reasonable attorney's fee" by a successful antitrust plaintiff. The court below either ignored this provision, or *sub silentio* construed such fee as being limited to a proportion of the damages recovered. The result conflicts with the established rule that the "reasonable attorney's fee" provided by the Clayton Act must in small cases be computed upon the basis of worth of services, in light of standards set forth in the Canons of Ethics, and not be limited by the amount of the damages recovered. See for example: *Osborn* v. *Sinclair Refining Co.*, 207 F. Supp. 856 (D. Md. 1962), *reversed on other*

*grounds,* 324 F. 2d 566 (4th Cir. 1963) (damages* of $325; counsel fees of $14,000); *Finley* v. *Music Corp. of America,* 66 F. Supp. 569 (S. D. Cal. 1946) (no damages; counsel fees of over $9,000); *Union Leader Corp.* v. *Newspapers of New England, Inc.,* 218 F. Supp. 490 (D. Mass. 1963), *reversed on other grounds,* 333 F. 2d 798 (1st Cir.), *cert. denied,* 379 U. S. 931 (1964) (damages of under $30,000; counsel fees of $68,000). The District Court (Wyzanski, J.) in the latter case said:

> "Allowing a reasonable attorney's fee in excess of the losses sustained by the plaintiff is proper whenever those losses could not otherwise have been recovered." (p. 492)

See also *Montague & Co.* v. *Lowry,* 193 U. S. 38, 48 (1904); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.,* 346 F. 2d 661 (6th Cir.), *cert. denied,* 382 U. S. 904 (1965); *Darden* v. *Besser,* 257 F. 2d 285 (6th Cir. 1958).

In addition, the Court below ignored the decision of this Court in *Sprague* v. *Ticonic National Bank,* 307 U. S. 161 (1939) (see also decision on remand, 28 F. Supp. 229 (S. D. Me. 1939)). That decision articulated the principle that a District Court has inherent power to award attorneys' fees to a litigant, proceeding as an individual, who for practical purposes establishes through *stare decisis* the claims of future litigants who may be similarly situated. *Sprague* was recently followed in *Gibbs* v. *Blackwelder,* 346 F. 2d 943, 945 (4th Cir. 1965).

Accordingly, the $70 which the Court of Appeals assumed to be plaintiff's maximum individual recovery does not limit the attorney's fee he may recover. The decision below rested on an erroneous connection between the

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*Before trebling, which occurs by operation of the statute, and is independent of the efforts of counsel.

amount of a plaintiff's damages and the allowable attorney's fee, which led to an erroneous conclusion as to finality.

**(3) Plaintiff does not have the standing to appeal required by the collateral order doctrine.**

In *Cohen* this Court made it clear that to be appealable an interlocutory order must have a "final and irreparable effect on the rights of the parties". 337 U. S. 541, 545. Plaintiff Eisen's rights here have not been so affected.

As this Court has interpreted the collateral order doctrine, an appellant must show that unless immediate appeal were permitted a substantive right possessed by him would be irretrievably lost. Thus, in *Cohen* if the plaintiff had not been required to furnish security, defendant's statutory right to indemnity would have been irretrievably lost. And in *Roberts* v. *United States District Court*, 339 U. S. 844 (1950), appellant was denied his right to proceed *in forma pauperis* because the District Court erroneously relied on state rather than federal law.

But plaintiff Eisen has not been denied any right by the order of the District Court. An individual who attempts to represent a class does not thereby confer upon himself any additional legal right. *Nagler* v. *Admiral Corp.*, 248 F. 2d 319, 327 (2d Cir. 1957). Eisen may still proceed with his causes of action. All that the order determines is that it was improper to denominate this a class action under Rule 23. In *Lipsett* v. *United States*, 359 F. 2d 956, at 958 (2d Cir. 1966), a prior case involving the same question presented here, the Second Circuit denied appealability because of appellants' lack of standing to appeal from an order striking class action allegations:

> "As to the original plaintiffs the matter is not within the collateral order doctrine, Cohen v. Beneficial

Industrial Loan Corp., 337 U. S. 541, 69 S. Ct. 1221, 93 L.Ed. 1528 (1949), because they too lack standing."

**(4) The order of the District Court is not final because subject to alteration or amendment in the discretion of the District Court.**

**(a) Rule 23**

The decision of the Court of Appeals nullifies the express direction of amended Rule 23 that an order determining whether an action is to be maintained as a class action may be altered or amended by the District Court at any time before decision on the merits.

Rule 23(c)(1) provides:

> "An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

The Rule reiterates in subdivision (d) that orders thereunder, including those which eliminate allegations as to representation of absent persons,

> ". . . may be altered or amended as may be desirable from time to time."

These provisions contemplate continuing jurisdiction and discretion in the District Court. They refute any notion that an order entered under Rule 23(c)(1) is "final." They provide no opening for an intermediate appellate mandate controlling further proceedings below, prior to the decision of the District Court on the merits. Their plain meaning accords with the direction that whether a class action is to be so maintained should be determined "[a]s soon as practicable after the commencement of an action"

(Rule 23(c)(1)). That the drafters had no intention to introduce an appeal at so early a stage in the litigation is demonstrated by the comments of the Advisory Committee (39 F. R. D. at p. 104):

> "A determination once made can be altered or amended before the decision on the merits if, upon fuller developments of the facts, the original determination appears unsound."

The representative nature of an action is a matter for administration by the District Court, which has continuing supervision prior to decision on the merits. The Rule manifests the continuing and interlocutory nature of the order involved, which bars an intrusion by the appellate court which would substitute its mandate for the flexibility given the District Court to alter or amend its own order and to shape its final judgment.

**(b) Rule 54(b)**

In addition, Rule 54(b) provides that any order, however designated, adjudicating fewer than all the claims, in the absence of an express direction for the entry of judgment, does not terminate the action and remains subject to revision by the District Court at any time before entry of judgment. See *District 65* v. *McKague*, 216 F. 2d 153 (3d Cir. 1954). This requirement of finality under Rule 54(b) has been strictly applied, even where the order from which appeal is denied "calls a halt to further prosecution of the complaint" and plaintiff has pointed out the futility of attempting further proceedings in the court below. See *Norte & Co.* v. *Defiance Industries, Inc.*, 319 F. 2d 336 (2d Cir. 1963). See also *Sears, Roebuck & Co.* v. *Mackey*,

351 U. S. 427, at 437-8 (1956), in which this Court considered Rule 54(b) and emphasized the desirability of vesting in the District Court control over the stages at which appeals from its orders should be taken.

Thus, the mandate of Rules 23(c)(1) and (d) and 54(b) is that an order of this character is not final. In *Cohen* v. *Beneficial Industrial Loan Corp., supra,* at p. 546, this Court explicitly stated that appeal from such an order was prohibited by 28 U. S. C. § 1291:

> "The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal."

**B. The decision below conflicts with those of other Courts of Appeals and with prior decisions of different panels of the Second Circuit.**

The decision of the Court of Appeals results in an unnecessary and unwise enlargement of permissible appeals and is in direct conflict with decisions in the Seventh, Eighth and Ninth Circuits and with prior decisions of the Second Circuit itself.

**(1) Inter-circuit conflicts**

(a) The Court of Appeals for the Seventh Circuit in *Jumps* v. *Leverone,* 150 F.2d 876 (7th Cir. 1945), dismissed an appeal from an order of the District Court striking from the complaint all reference to its purported prosecution on behalf of other persons similarly situated. Hold-

ing that the appeal was not taken from a final judgment, the Court of Appeals stated (150 F.2d at p. 877):

> "Plaintiffs are appealing from an order that does not affect their rights. It affects the rights of persons not on the record."

The Court held that the order controlling the size of the class was discretionary, and "is interlocutory and not final, and therefore is not appealable." *Ibid.* See also *Weeks* v. *Bareco Oil Co.*, 125 F.2d 84, 93-4 (7th Cir. 1941).

(b) The Court of Appeals for the Eighth Circuit in *Lockwood* v. *Hercules Powder Co.*, 172 F.2d 775 (8th Cir. 1949), on its own motion dismissed as beyond its jurisdiction an appeal from orders striking from the complaint the names and claims of all those, except himself, on whose behalf plaintiff purported to bring the action. The Court held (172 F.2d at p. 777):

> "We think the orders appealed from are not appealable; that they are not final orders but were subject to revision by the court at any time before the entry of judgment adjudicating all the claims. The claim of the plaintiff was not dismissed by the orders. That claim depended, on its merits, upon the same contractual and legal relations upon which the claims of the 'similarly situated' parties rested."

The Court noted that under Rule 54(b) of the Rules of Civil Procedure no appealable judgment could be entered without an express direction by the District Court, and held the order was not final, citing *Catlin* v. *United States*, 324 U. S. 229 (1945).

(c) The Court of Appeals for the Ninth Circuit in *Rogers* v. *Alaska Steamship Co.*, 249 F. 2d 646, 648-650

(9th Cir. 1957), dismissed an appeal from an order limiting the capacity of certain seamen to sue representatively. The Court held that "the non-appealability of the order . . . in this type of class action is apparent," quoting with approval the earlier holding of the Second Circuit in *All American Airways* v. *Elderd,* 209 F. 2d 247 (2d Cir. 1954) (referred to below), and citing decisions of this Court (*E.g., Collins* v. *Miller,* 252 U. S. 364, 370 (1920)) and others to the effect that a judgment to be appealable must be final as to all parties, the whole subject-matter, and all the causes of action involved.

**(2) Intra-circuit conflicts**

The Court of Appeals for the Second Circuit in three of its own prior decisions by different panels has held squarely that orders such as this in class actions are not final or appealable:

(a) *Lipsett* v. *United States,* 359 F. 2d 956 (2d Cir. 1966) held at p. 958:

> "The first issues are jurisdictional. The order striking the allegation of a class action is certainly not appealable. As to the intervenors, they lack standing altogether. As to the original plaintiffs, the matter is not within the collateral order doctrine, Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), because they too lack standing."

(b) *All American Airways* v. *Elderd,* 209 F.2d 247 (2d Cir. 1954) held at p. 249:

> "In any event the non-appealability of the order in this type of class action is apparent."

That decision cited *Jumps* v. *Leverone* in the Seventh Circuit, and was later relied upon by the Ninth Circuit in *Rogers* v. *Alaska Steamship Co.* (both discussed at pp. 14-16, *supra*).

(c) In *Oppenheimer* v. *F. J. Young & Co.*, 144 F. 2d 387 (2d Cir. 1944), Judge Augustus N. Hand stated that an order dismissing as to the class but with leave to proceed individually "did not dispose of the litigation and it was not final":

> "The individual claims of the two plaintiffs asserted in the second amended complaint, and sustained by the interlocutory order, arose out of the same matters as those upon which the class action was founded, and there must be finality in the disposition of both in order that an appeal may lie. . . . The appeal from the interlocutory order must, therefore, be dismissed." (at p. 388)

The conflict in decisions among the circuits upon a subject needing a uniform rule (see *Commissioner* v. *Bilder*, 369 U. S. 499, 501 (1962)), requires prompt resolution by certiorari from this Court (*Sears, Roebuck & Co.* v. *Mackey, supra*, at p. 429), particularly in a case where there are internal conflicts among different panels within the Second Circuit itself. *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507 (1950); *John Hancock Mutual Life Ins. Co.* v. *Bartels*, 308 U. S. 180, 181 (1939).

**C. The decision below raises grave doubts as to proper judicial administration under a new Federal Rule of Civil Procedure.**

The decision below denominates as final an order under newly amended Rule 23(c)(1), although the text of that Rule expressly lodges continuing jurisdiction in the District

Court to alter or amend its orders relating to the character of an action as it proceeds and new facts are developed. The conflict between the decision below and the text of Rule 23(c)(1) creates serious and needless confusion as to proper procedure under new Rule 23.

Subsection (c)(1) calls for early determination by a District Court whether an action brought as a class action may be so maintained. The opinion of the Court of Appeals leaves unanswered several questions. Are such determinations by District Courts now appealable as of right whenever a disappointed plaintiff claims he will not continue the action as an individual? If so, is a District Court upon remand forever bound by the determination of the Court of Appeals? Or may the District Court modify the character of the suit to take account of newly developed facts? If so, is the District Court's second determination immediately appealable like the first? Such questions illustrate that the approach taken by the Court of Appeals was not the "practical rather than a technical" one approved by this Court in *Gillespie* v. *United States Steel Corp., supra,* at p. 152.

The importance of proper construction of a new federal rule of civil procedure requires that certiorari be granted. See *Anderson* v. *Yungkau,* 329 U. S. 482, 483 (1947) and *Schlagenhauf* v. *Holder,* 379 U. S. 104, 109 (1964).

**D. The Court of Appeals' approach to finality is impractical and will lead to a lack of uniformity.**

This Court has instructed that finality be given a "practical rather than a technical construction." *Gillespie* v. *United States Steel Corp., supra,* at p. 152. That instruction is particularly appropriate here where the practical effect of the decision below will be to swell federal appellate

dockets. The Court of Appeals' opinion here not only allows an appeal immediately from any order determining that the action is not maintainable as a class action (although permitting plaintiff to proceed individually), but by its reasoning also invites appeals by any plaintiff unwilling to proceed with his action unless allowed immediate appeal from a discretionary order he finds intolerable.

Knowledge of when an order may be appealed is of great importance to litigants, and the rules must be uniform throughout the federal judicial system. As this Court said in *Carroll* v. *United States,* 354 U. S. 394 at 405-6 (1957):

> "Appeal rights cannot depend on the facts of a particular case. The Congress necessarily has had to draw the jurisdictional statutes in terms of categories.
>
> * * *
>
> "Moreover, in a limited sense, form *is* substance with respect to ascertaining the existence of appellate jurisdiction. While it is always necessary to categorize a situation realistically, to place a given order according to its real effect, it remains true that the categories themselves were defined by the Congress in terms of form. Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered, and some are never satisfactorily reviewable." [Emphasis in original]

The uncertainties of appellate jurisdiction introduced by the Court of Appeals should be removed by this Court. See *Sears, Roebuck & Co.* v. *Mackey, supra,* at 429; *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.,* 385 U. S. 23, 24 (1966).

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 23, 1967.

## APPENDIX A

### Opinion and Order of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

---

MORTON EISEN, on behalf of himself and all other purchasers and sellers of "odd-lots" on the New York Stock Exchange similarly situated,

*Plaintiff,*

*—against—*

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, each limited partnerships under New York partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an unincorporated association,

*Defendants.*

---

TYLER, *D.J.*

This is an action brought by a New York resident, Morton Eisen, charging the two major "odd-lot" dealers on the New York Stock Exchange—defendants Carlisle & Jacquelin and DeCoppet & Doremus—with conspiring and combining to monopolize odd-lot trading and with charging excessive fees in violation of the Sherman Act. 15 U. S. C. 1 and 2. The complaint also pleads a third claim or cause of action against the New York Stock Exchange ("Exchange") upon the theory that the Exchange breached its duties prescribed by the Securities Exchange Act of 1934 for suspension of odd-lot trading. 15 U. S. C. 78f(b), 78f(d) and 78s(a). Eisen, who describes himself as an investor, asserts that he sues for himself and on behalf of all odd-lot purchasers and sellers on the Exchange.

The taproot of Eisen's three claims is the so called "odd-lot differential" charged by the broker defendants and other odd-lot dealers for transactions in other than 100 share lots of securities. As is well known, the normal trading units on the stock exchanges are in multiples of 100 shares, sometimes called "round-lots". Odd-lots, thus, are units of stock less than 100, the established unit of trading. For odd-lot transactions, in addition to the normal brokerage commission, an additional fee known as the "odd-lot differential" is charged. At the time this suit was commenced, the differential was ⅛ point (12½ cents) per share when the price per share was 39⅞ or below and ¼ point (25 cents) when the price was 40 or above. Effective July 1, 1966, however, this "break point" of $40 was increased to $55 under specific approval of the Securities and Exchange Commission. The execution price of an odd-lot includes the differential. On a customer's order to buy an odd-lot, the differential is added to the price of the effective offer or sale; on a customer's order to sell, the differential is subtracted from the price of the effective sale or bid. It is Eisen's theory in this case that the two broker-dealer defendants, with the benign indulgence of the Exchange, have "established, increased and maintained" the differential.

The defendants have moved pursuant to amended Rule 23(c)(1), F. R. Civ. P., effective July 1, 1966, seeking to obtain an adjudication that the present action is not maintainable as a class action. Plaintiff, of course, relies on new Rule 23 to support his suit as a class action.

Amended Rule 23(a) sets forth four specific prerequisites to a class action:

> (1) The class "is so numerous that joinder of all members would be impracticable";

(2) questions of law or fact common to the class exist;

(3) claims or defenses of the representative parties are typical of those of the class; and

(4) the representative parties will adequately protect the interests of the class.

Amended Rule 23(b) specifically states that for a suit to be maintained as a class action, the specific prerequisites just listed must be satisfied and, in addition, at least one of three following requirements or conditions must be shown:

1. Prosecution of separate actions by or against separate members of the class would create a risk of inconsistent or varying adjudications, or adjudications which would practically dispose of or impair the interests of class members not parties thereto;

2. the party opposing the class has acted or failed to act, thereby rendering appropriate injunctive or declaratory relief respecting the entire class; or

3. the court finds that questions of law or fact common to the class predominate over such questions affecting only individual members and, in addition, that the class action is superior to other available methods or procedures for fair and efficient adjudication of the controversy. See *Notes of Advisory Committee on Amendments to Rules of Civil Procedure* (hereinafter "Advisory Com. Notes"), 39 F. R. D. 98-100.

As will be suggested by the discussion hereinafter, plaintiff's suit could only fit in theory the last-mentioned category or requirement set forth in amended Rule 23(b) —i.e. that plaintiff's suit, if to be maintained as a class action, must be shown to present questions of fact or law common to the class which predominate over such questions affecting only individual members. Suffice it to say here that, despite belated unconvincing suggestions to the contrary in their reply brief, plaintiff's counsel originally intended and argued that their client's suit meets this requirement. Thus, plaintiff in effect attempts to show that his action is what was characterized under former Rule 23 as a spurious class action, and it may be at least generally helpful to consider some of the judge-made requirements and prerequisities for maintaining a spurious class action under the old Rule in order to determine if Eisen has successfully met those specifically set forth in subparagraphs (a) and (b)(3) of the amended Rule. See discussion at 39 F. R. D. 98-103.

The spurious class action under the former Rule was considered merely a permissive joinder device, and prior to the July 1, 1966 amendment, the judgment in such cases bound only the original parties of record and those who intervened and became parties to the action. See *Lipsett* v. *United States*, 359 F. 2d 956, 959 (2d Cir. 1966); *All American Airways, Inc.* v. *Elderd*, 209 F. 2d 247 (2d Cir. 1954); *Kainz* v. *Anheuser-Busch, Inc.*, 194 F. 2d 737 (7th Cir. 1952); *Schatte* v. *International Alliance of Theatrical Stage Employees, etc.*, 183 F. 2d 685 (9th Cir. 1950); *California Apparel Creators* v. *Wieder of California*, 162 F. 2d 893 (2d Cir. 1947); *Cutler* v. *American Federation of Musicians, etc.*, 211 F. Supp. 433 (S. D. N. Y. 1962). The principal requirements for its use were that the character

of the right sought to be enforced for or against the class be several, that there be a common question of law or fact affecting the several rights and that common relief be prayed for. Nevertheless, as I read the above cited pre-July 1, 1966, cases and others similar to them, substantially all of the specifically stated prerequisites and requirements now found in amended Rule 23(a) and (b) were deemed essential for maintaining a spurious class action under old Rule 23, even though they were not all spelled out therein. The prerequisite, for example, that the plaintiff bringing the action must be one who will fairly protect the interests of the class was one which, though recognized, did not always cause the courts undue concern, largely because only the original plaintiff and intervenors were bound by the judgment. The Court of Appeals for this Circuit, for example, having long recognized that a spurious class suit under former Rule 23 in reality was no more than a permissive joinder device, stated years ago that, in such suits, "there is no need for a searching inquiry concerning the adequacy of [plaintiff's] representation of others in the class." *York* v. *Guaranty Trust Co. of New York,* 143 F. 2d 503 (2d Cir. 1944), *reversed on other grounds,* 326 U. S. 99 (1945). Notwithstanding that comparatively extreme statement, the courts in this circuit, as in others, did not permit use of the class action device under former Rule 23 where it appeared plainly that plaintiff could not properly protect the interests of the class. See *Austin* v. *Warner Bros. Pictures,* 19 F. R. D. 93 (S. D. N. Y. 1953).

Now that amended Rule 23 purports to obliterate the old distinctions between "true", "hybrid" and "spurious" class actions, however, the requirement that plaintiff be able to fairly insure the adequate representation of all becomes considerably more significant since all members

of the class are bound by the judgment unless they expressly ask to be excluded from the class. See amended Rule 23(c)(3), F. R. C. P.; *Lipsett* v. *United States*, *supra.*

Assuming *arguendo* that plaintiff has adequately set forth and shown compliance with other prerequisites of paragraph (a) of the new rule, he has not established that he ". . . will fairly and adequately protect the interests of the class". This alone is enough for this court to make a determination that this action cannot be maintained as a class action. See *Advisory Com. Notes*, 39 F. R. D. 100 (1966).

Plaintiff in his papers gives no compelling reasons and alleges no facts to support the proposition that he can adequately protect the interests of possibly hundreds of thousands of members of the alleged class except to assert that both of his lawyers are well-qualified antitrust specialists. In disposing of a similar contention made in *Austin Theatre* v. *Warner Bros. Pictures, supra* at 96, Judge McGohey of this court said, "However, here there is required no more than a superficial inquiry to determine that the plaintiff has failed to allege any facts to show that it will, as claimed, adequately represent the class." Such reasoning applies *a fortiori* under the new concept that all members of a class are bound by any judgment to be entered.

Eisen does not even attempt to estimate the extent of damages which he allegedly suffered as a result of the odd-lot differential, nor does he specify the nature or number of the transactions in which he engaged and wherein he was charged a "differential". A class action is premised in part upon the theory that members of the class who are not before the court can justly be bound because the self-

interest of their representatives will assure adequate litigation of the common issues. See *Aalco Laundry & Cleaning Co.* v. *Laundry Linen & Towel Chauffers & Helpers Union*, 115 S. W. 2d 89 (Mo. App. 1938). From the facts as presented, it is impossible to determine and rule that Eisen can adequately protect the interests of the absent members of his asserted class. Concededly, he alleges that he has been an active investor in securities since 1960. We are not told, however, in what he invested. Even assuming, as Eisen would have us do, that he bought and sold securities in odd-lots—i.e. in less than 100 share blocks, we do not know which of the more than 1,600 available listed stocks he purchased or sold, the price ranges of the stocks or the considerations that motivated his transactions. That these are relevant facts is beyond serious question. In the six years during which Eisen claims to have been an investor, over 1,147,000,000 shares of stock were traded in odd-lot transactions. Some of the participants in these dealings were investors like Eisen, but just as certainly others were dealers, traders, arbitrageurs and speculators. The prices of the shares involved ranged from several dollars to several hundred dollars. The nature of the myriad odd lot transactions was certainly varied; orders were limited or contingent, on margin or for cash, long or short, and for a fixed amount or on a long term investment plan.[1] In short, even if Eisen were given leave to serve an amended pleading setting forth with particularity the nature and amount of his own investment transactions, the diverse rights and interests of other members of the claimed class plainly could not be reasonably protected by plaintiff in this litigation.

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[1]See Rule 124 of the New York Stock Exchange.

Eisen's inadequacy as a representative of the asserted class is further underscored by the obvious fact that his interest, as sole plaintiff, is miniscule compared to the interests of the class as a whole. The number of plaintiffs bringing a class action in relation to the numerical size of the class, of course, should not be the sole basis for determining the existence or non-existence of a class action; however, it can be a valid and important factor in assessing plaintiff's ability to adequately represent the class. *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84 (7th Cir. 1941); *Pelelas* v. *Caterpillar Tractor Co.*, 113 F. 2d 629 (7th Cir. 1940); *McArthur* v. *Scott*, 113 U. S. 340 (1884). In *Pelelas, supra* at 632, the court held, ". . .under it [Rule 23] the court is at liberty to consider the number appearing on the record as contrasted with the number in the class. . . . There must be a sufficient number of persons to insure a fair representation of the class." Eisen himself estimates—perhaps too conservatively—that the class numbers in the hundreds of thousands.[2] Thus, it is impossible to assume that he alone with a comparatively miniscule and limited interest in odd lot transactions can represent that large a class, many of whose members necessarily have larger and different interests.

By far the most serious difficulty with plaintiff's claim to be able to properly protect the interests of the class, in my judgment, is that stemming from subparagraphs (2) and (3) of amended Rule 23(c). In substance, these provide, *inter alia*, that in a class action the best notice practicable must be furnished to the class members and that the

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[2]See defendant's affidavit by Sander Landfield wherein it is projected that there may have been as many as 3,750,000 odd-lot customers within the past four to six years.

notice must specifically warn such persons that they will be bound by any judgment in the action unless they appear and request exclusion therefrom. Further, of course, it is provided in subparagraph (c)(3) that the judgment, whether favorable or unfavorable to the class, shall include all members of the class as found by the court and who do not appear and obtain specific exclusion.

As already suggested, this provision represents a most important substantive change from Rule 23 as it read prior to July 1, 1966. *Lipsett* v. *United States, supra.* Presumably aware of this change, Eisen claims to be the sole representative of hundreds of thousands of other persons who paid the odd-lot differential and who necessarily will be bound under Rule 23(c)(3) by any judgment in this action unless they specifically ask to be excluded after receiving appropriate notice. Yet he does not claim that one other person or entity has expressed the slightest interest in the prosecution of this action. See *Weeks* v. *Bareco Oil Co., supra* at 94. More important, Eisen and his counsel have taken the curious position in their papers and upon oral argument that press advertisements plus notices to stock exchange firms will constitute all the notice necessary in this case. To this, I am constrained to make two observations. First, in the light of the new concept under the amended Rule that members of a class are specifically bound by any judgment, favorable or unfavorable, unless they affirmatively "opt out", it is virtually certain that far better notice than plaintiff apparently contemplates would be necessary here to comply with amended Rule 23(c)(2) and, even more importantly, with due process standards. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 315-320 (1950). In other words, as defense

counsel have incisively argued, both the Rule and concepts of due process require individual notice for the class members who can be identified and notice amounting to more than a "mere gesture" for those who cannot be identified. Because of obvious practical financial limitations inherent in the circumstances here presented, proper notice as required almost certainly cannot be given—and plaintiff is short of the mark in his arguments to the contrary. Second, plaintiff's erroneous notion that individual notice to members of the class is not required by amended Rule 23 but that publication, either by "free publicity" or by paid advertisement in newspapers of national distribution, or both, is sufficient, raises the suspicion, which may or may not be justified, that he is more interested in notice for the sake of undesirable solicitation of claims than for proper protection of the interests of the other members of the class. See *Advisory Com. Notes,* 39 F. R. D. 107; *Cherner* v. *Transition Electronic Corp.,* 201 F. Supp. 934 (D. C. Mass. 1962).

For reasons similar to those leading me to conclude that Eisen cannot fairly and properly represent the other members of the class, I am not satisfied that the questions common to the class predominate over questions affecting individual members. Rule 23(b)(3); see *Advisory Com. Notes,* 39 F. R. D. 103. Mention has already been made of the tremendous size of the asserted class, the fact that there is no evidence that any other member has the slightest interest in this litigation and the necessarily varied nature and quantum of the interests of other odd-lot purchasers and sellers. In my view, these circumstances create a powerful presumption that questions affecting individual members predominate over questions common to the class, and plaintiff has offered little or nothing to rebut this pre-

sumption. Moreover, these factors plus the previously discussed difficulties of providing adequate notice to the huge class as required by the amended Rule and by concepts of due process suggest almost insuperable difficulties in fair and proper management of this suit as a class action.

The motion of defendants is granted to the extent that this action, as a class action, is dismissed. This does not mean, however, that the complaint viewed solely as a statement of the individual claims of plaintiff Eisen is dismissed; moreover, nothing herein stated should be construed as a ruling on the merits, or lack thereof, of the claims pleaded on behalf of plaintiff individually.

It is so ordered.

Dated: New York, N. Y.
September 27, 1966

H. R. TYLER JR.
U. S. D. J.

## APPENDIX B

### Order Denying Certificate Under 28 U. S. C. § 1292(b)

October 25, 1966

This motion is denied. An intermediate appeal from the opinion and order filed on September 30, 1966 will not materially advance the ultimate resolution of this litigation. No controlling question of law is involved. Nothing has been done to prevent plaintiff from litigating his claims. See *Gottesman* v. *General Motors Corporation,* 268 F. 2d 194 (2d Cir., 1959); *Kroch* v. *Texas Company,* 167 F. Supp. 947, at 949 (S. D. N. Y., 1958).

It is so ordered.

H. R. Tyler, Jr.
U. S. D. J.

## APPENDIX C

## Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

---

MORTON EISEN, on behalf of himself and all other purchasers and sellers of "odd-lots" on the New York Stock Exchange similarly situated,

*Appellant,*

*—against—*

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, each limited partnerships under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an unincorporated association,

*Appellees.*

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KAUFMAN, *Circuit Judge*:

The sole question presented by this motion is whether appellant may take an appeal from an order of the district court dismissing his class action, but permitting him to litigate his individual claims.

Morton Eisen brought an action in the district court alleging that two major "odd-lot" dealers on the New York Stock Exchange—Carlisle & Jacquelin and DeCoppet & Doremus—had conspired and combined to monopolize odd-lot trading, and had charged excessive fees, in violation of the Sherman Act. 15 U. S. C. §§ 1, 2. Specifically, he challenged the so-called "odd-lot differentials" charged by the appellees and other odd-lot dealers for transactions

involving other than 100 share lots of securities. The complaint also charged the New York Stock Exchange with having breached its duties, allegedly prescribed by the Securities Exchange Act of 1934, concerning supervision of odd-lot trading. 15 U. S. C. §§ 78f(b), 78f(d), 78s(a).

Eisen sued both for himself and on behalf of all odd-lot purchasers and sellers on the Exchange. Appellees moved to dismiss the class action, alleging that it was not maintainable under amended Rule 23(c)(1) of the Federal Rules of Civil Procedure. Judge Tyler granted the motion and dismissed the class action, but did not dismiss Eisen's individual claims or pass on their merits.

It is too clear for discussion that all orders are not appealable. 28 U. S. C. § 1291 provides that the courts of appeals have jurisdiction of appeals from all "final" decisions of the district courts, while 28 U. S. C. § 1292 permits appeals from a narrowly limited class of interlocutory orders. But as the Supreme Court has commented, "[A] decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." Gillespie v. United States Steel Corp., 379 U. S. 148, 152 (1964). The question presented to us, therefore, is whether Judge Tyler's order dismissing the class action falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541, 546 (1949).

In making this determination, Justice Douglas' language in the *Gillespie* case is instructive:

> [I]t is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality be given a *"practical rather than a technical construction."* . . . [I]n deciding the question of finality the most important competing considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." 379 U. S. at 152-53 (emphasis supplied).

In the present case, these considerations, rather than being "competitive," lead to a single conclusion—that the order dismissing this class action is appealable. The alternatives are to appeal now or to end the lawsuit for all practical purposes. Judge Tyler's order "if unreviewed, will put an end to the action." Chabot v. National Securities and Research Corp., 290 F. 2d 657, 659 (2d Cir. 1961). We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen. See Escott v. Barchris Constr. Corp., 340 F. 2d 731, 733 (2d Cir.), *cert. denied sub nom.* Drexel & Co. v. Hall, 382 U. S. 816 (1965). If the appeal is dismissed, not only will Eisen's claims never be adjudicated, but no appellate court will be given the chance to decide if this class action was proper under the newly amended Rule 23.

There are, therefore, most compelling reasons to deny this motion to dismiss the appeal; and permitting Eisen to proceed in no way conflicts with any precedents of this Court. Appellees rely on Oppenheimer v. F. J. Young & Co., 144 F. 2d 387 (2d Cir. 1944), but that decision was reached

before the Supreme Court spoke in *Cohen, supra.* While it is true that in Lipsett v. United States, 359 F. 2d 956 (2d Cir. 1966), we did not permit an appeal from the dismissal of a class action, we reached that conclusion because the facts did not come within the framework of the *Cohen* doctrine; the plaintiffs lacked standing, and dismissal of the class action allegations, we said, merely "prettified" the pleadings since the action could still continue.

Dismissal of the class action in the present case, however, will irreparably harm Eisen and all others similarly situated, for, as we have already noted, it will for all practical purposes terminate the litigation. Where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed. See Roberts v. U. S. District Court, 339 U. S. 844 (1950); *Chabot* v. *National Securities and Research Corp., supra.*

Motion denied.

## APPENDIX D

## Order Denying Petition for Rehearing

[SAME TITLE]

Carter Ledyard & Milburn, New York, N. Y., for Carlisle & Jacquelin, appellee.

Kelley Drye Newhall Maginnes & Warren, New York, N. Y., for DeCoppet & Doremus, appellee.

Milbank, Tweed, Hadley & McCloy, New York, N. Y., for New York Stock Exchange, appellee.

Motion denied.

S. R. W.
L. P. M.
I. R. K.
U. S. C. JJ.

January 13, 1967

## Order Denying Petition for Rehearing in Banc

[SAME TITLE]

Carter Ledyard & Milburn, New York, N. Y., for Carlisle & Jacquelin, appellee.

Kelley Drye Newhall Maginnes & Warren, New York, N. Y., for DeCoppet & Doremus, appellee.

Milbank, Tweed, Hadley & McCloy, New York, N. Y., for New York Stock Exchange, appellee.

No active circuit judge having requested that a vote be taken on the suggestion that the case be reheard in banc, the same stands denied.

s/ J. Edward Lumbard
Chief Judge

13 January 1967